OVERSEAS UNION FINANCE LTD. v. LIM JOO CHONG

[O.C.J. (Raja Azlan Shah J.) May 20, 1971]

[Kuala Lumpur — Originating Summons No. 374 of 1959]

Land Laws — Charge on land as security for loan — Default of instalment payment — Notice of default — Whether in Form 16D or 16E of National Land Code, ss. 254, 255.

Moneylenders — Memorandum of agreement — Requirements of — Moneylenders Ordinance, 1951, s. 16.

Practice and Procedure — Originating Summons — Discontinuance of action — When rules apply — R.S.C., 1957, O. 26, r. 1, O. 55, r. 5A, O. 71, r. 1(1).

Equity and Trust — Power of executor-cum-trustee to charge land — Trustee Ordinance, 1949.

This was an application by way of summons-in-chambers for an order that the applicant/chargee may be at liberty to discontinue this action which they had started by way of originating summons.

The respondent/chargor borrowed a sum of $15,000 at an interest of 12% per annum from the applicant/chargee, the Overseas Union Finance Ltd., a licensed moneylender. Repayment of the loan was on demand, whilst meanwhile the respondent/chargor was to repay the principal sum at a monthly instalment of $346.50. The respondent/chargor charged his land at No. 14-C Jalan Raja Laut, Kuala Lumpur, to the applicant/chargee, as security for repayment of the loan. The charge was duly registered.

A memorandum of agreement for the loan was drawn up pursuant to section 16 of the Moneylenders Ordinance, 1951 and signed by the parties on January 21, 1969. A memorandum of charge was also signed by the parties on the same day.

On August 19, 1969, the applicant/chargee delivered a statutory notice of default under Form 16D of the National Land Code to the respondent/chargor reminding him that he had failed to pay the total sum of $1,386 for four monthly instalments, and that if he did not remedy the breach within the time stipulated, the applicant/chargee would proceed to apply for an order for sale.

As this notice was not complied with, the applicant/chargee, on December 3, 1969, applied by originating summons for an order that the said land be sold by public auction. In his affidavit the respondent/chargor opposed this application on three grounds: (1) the contract was unenforceable as the memorandum of agreement did not comply with section 16 of the Moneylenders Ordinance, 1951 in that the date of the loan was not correctly stated and the terms of the loan were not correctly set out; (2) the charge was void because being an executor-cum-trustee he did not have power either under the will or the Trustee Ordinance, 1949 to charge the land; (3) the notice of default was in the wrong form and therefore not an effective notice. He contended that it should be in Form 16E under section 255 and not Form 16D under section 254 of the National Land Code. Subsequently, however, the applicant/chargee sought to discontinue the action on the ground that even if the court were to grant an order for sale they, the applicant, would find difficulty in selling the property, it being a residence and in an area where the value had fallen. This application was opposed by the respondent/chargor on the grounds that an originating summons could not be discontinued and that the applicant/chargee knowing that they could not get the order for sale, now tried to get an illegal charge on the land by discontinuing the action.

Held: (1) the memorandum of agreement was signed and delivered on January 21, 1969 and not January 18, 1969 as stated in the memorandum. Furthermore, the memorandum stated that payment of the loan was to be made on January 18, but in actual fact the payment was made in various amounts on different dates subsequent to the signing on January 21. These circumstances constituted a non-compliance of section 16(3) of the Moneylenders Ordinance in that the terms were not fully set out. Therefore the memorandum did not contain all the terms of and the real date of the loan. This constituted a material error which tended to mislead and made the contract unenforceable;

(2) the burden is always on the person seeking to enforce the contract to show that the requirements of the section have been fulfilled. Here the applicant had not discharged the burden. They did not reply to the respondent/chargor's affidavit which alleged that they had not complied with the Ordinance. The contract was by reason of this non-compliance unenforceable;

(3) neither the will nor the Trustee Ordinance conferred power upon the respondent/chargor to charge the said land. As such the charge was void;

(4) Form 16D can be used for any charge, whereas Form 16E is to be used specially where the principal sum is payable on demand. Even where the principal sum is payable on demand, Form 16D can still be used. In this case, when the chargee demanded payment it was for the principal sum plus interest for four monthly instalments. It was thus proper to use Form 16D;

(5) under O. 26 r. 1 of the Rules of the Supreme Court, 1957, a plaintiff may discontinue an action by notice in writing before defence or after defence before taking any other proceeding in the action. At any later stage, leave to discontinue must be obtained. Under O. 55 r. 5A the method of proceeding prescribed for a sale, etc., is by originating summons. Therefore an originating summons taken as of course under O. 55 r. 5A is a civil proceeding commenced "in such ... manner (other than a writ) as is prescribed by these Rules ...", and consequently as falling within the definition of an action. Since by definition an originating summons in this case could properly be called an action, O. 26, r. 1 could be invoked to discontinue it. Since an originating summons is an action coupled with the fact that the respondent/chargor had a defence, the rules of discontinuance could be invoked in this case. However, the court has a discretion whether to allow a discontinuance. In the circumstances of this case, the application to discontinue was dismissed.

Cases referred to:-

(1) *Tan Hood Keng* v. *Arunasalam Chetty* O.S. No. 38 of 1909 (unreported).

(2) *Re Dyson's Trade Mark* (1891) 65 L.T. 488.

(3) *In re Fawsitt* 30 Ch. D. 231.

(4) *Sherwood* v. *Deeley* (1931) T.L.R. 419.

(5) *Mary Michael* v. *United Malayan Banking Corporation Bhd.* [1971] 1 M.L.J. 172.

ORIGINATING SUMMONS.

Ronald Yeo for the applicant.

M. Segaram for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application by way of summons-in-chambers for an order that the applicant/chargee may be at liberty to discontinue this action which they had started by way of originating summons (O.S.No. 374/69).

The undisputed facts of the case are as follows:- The respondent/chargor borrowed a sum of $15,000 at an interest of 12% per annum from the applicant/chargee, the Overseas Union Finance Ltd., a licensed moneylender. Repayment of the loan was on demand but until demand the respondent/chargor is to pay the principal sum at a monthly instalment of $346.50. To secure the repayment of the loan the respondent/chargor charged his land at No.14-C, Jalan Raja Laut, Kuala Lumpur to the applicant/chargee. The charge

was duly registered under presentation No. 374 Vol. CXCVI, Folio 142.

A memorandum of agreement for the loan was drawn up pursuant to section 16 of the Moneylenders Ordinance, 1951 and signed by the parties on 21st January 1969. A memorandum of charge was also drawn up and signed by the parties on the same day.

On 19th August 1969 the applicant/chargee delivered a statutory notice of default under Form 16D of the National Land Code to the respondent/chargor reminding him that he has failed to pay the total sum of $1,386 being the sum for four (4) monthly instalments and that if he fails to remedy the breach within the time stipulated they (the applicant/chargee) will proceed to apply for an order for sale.

This notice was not complied with. On the 3rd December 1969 the applicant/chargee filed an application by originating summons for an order that the said land be sold by public auction under the National Land Code to satisfy the total sum due to the chargee at the date of the order with interest on the principal sum due at 12% per annum till the time of sale which is to be specified. In his affidavit dated 15th February 1970 the respondent/chargor opposed this application on three grounds:— (1) That the contract was unenforeable as the memorandum of agreement did not comply with section 16 of the Moneylenders Ordinance, 1951 in that the date of the loan was not correctly stated and the terms of the loan were not correctly set out. (2) That the charge was void because being an executor-cum-trustee he did not have power either under the will or the Trustee Ordinance, 1949 to charge the land. (3) The notice of default was in the wrong form and therefore not an effective notice. He contends that it should be in Form 16E under section 255 and not Form 16D under section 254.

After receiving the respondent/chargor's affidavit the applicant/chargee sought to discontinue the action on the ground that even if the court were to grant an order for sale they, the applicant, would find difficulty in selling the property it being a residence and in an area where the value has fallen. Again this application was opposed by the respondent/chargor on the grounds that an originating summons cannot be discontinued and that the applicant/chargee knowing that they could not get the order for sale now tries to get an illegal charge on the land by discontinuing the action.

I shall first consider the application for discontinuance. The respondent/chargor contends that an originating summons cannot be discontinued. The rules for discontinuance are contained in Order 26 of the Rules of the Supreme Court, 1957. Under rule 1 of the Order a plaintiff may discontinue an action by notice in writing before defence or after defence before taking any other proceeding in the action. At any later stage, leave to discontinue must be obtained. In *Mallal's* Supreme Court Practice at p. 324 the learned author states that the Order does not apply to an originating summons. As authority he cites the unreported case of *Tan Hood Keng* v. *Arunasalam Chetty*[1] which followed *Re Dyson's Trade Mark*.[2] With due respect to the learned author I do not think this is the correct statement of the rule. "Action" under 0.71 rule 1 sub-rule (1) means

> "a civil proceeding commenced by writ or in such other manner as is prescribed by these Rules, but does not include a criminal proceeding".

Under Order 55 rule 5A the method of proceeding prescribed for a sale etc., is by originating summons. Therefore an originating summons taken as of course under 0.55 r.5A is a civil proceeding commenced "in such . . . manner (other than a writ) as is prescribed by these Rules . . . ", and consequently as falling within the definition of an action. (*Re Fawsitt*[3]). Since by definition an originating summons in this case can properly be called an action, Order 26, rule 1 can be invoked to discontinue it.

As for the statement in *Mallal's* Supreme Court Practice I think it should not be taken at face value. It is regrettable that the case of *Tan Hood Keng* v. *Arunasalam Chetty* is not available for closer scrutiny. The only alternative would be to examine the case of *Re Dyson's Trade Mark*. North J. said: "I do not see how the rule (of discontinuance) applies to a case of which there cannot be a defence." What exactly the learned judge meant when he said this is quite obscure. On this point I would also like to refer to the *Annual Practice* 1963 at page 592 where under the heading *Order not applicable* is stated "This order does not apply to an originating notice of motion (*Re Dyson's Trade Mark*) nor it would seem to any case in which there cannot be a defence." In my view "defence" here should not be construed to mean a formal statement of defence as required under a writ of summons; rather it should be taken to mean any kind of defence. A further point to note is the fact that *Re Dyson's Trade Mark* is a case of originating notice of motion while the present is an originating summons. While an originating summons can be heard either in open court or in chambers, an originating notice of motion is always heard in open court. This could be a distinguishing factor justifying me in not following the case.

But clearly before the rules of discontinuance can be invoked there must be a defence (by writ or otherwise). A borrower may defend a proceeding brought by a moneylender on the ground *inter alia* that the note or memorandum is inaccurate in a material particular. "Material particular" means that the note or memorandum must contain all the terms of the contract and in particular state the date on which the loan is made, the principal, the interest *per centum* per annum, in accordance with the Moneylenders Ordinance, 1951. (See *Atkin's* Court Forms, 2nd Ed. Vol. 27 pp. 202-203). In the present case the respondent/chargor contends that the contract is unenforceable because the memorandum of agreement does not comply with the Moneylenders Ordinance, 1951, in that the date of the loan in the memorandum is wrong and that the memorandum does not contain full terms of the agreement.

Since an originating summons is an action coupled with the fact that the respondent has a defence, the rules of discontinuance can be invoked in this case.

However, it is at my discretion whether I should allow a discontinuance. Guidelines to the exercise of discretion can be found in the *Annual Practice* 1963 at page 593 under the heading *Before Judgment* which reads —

"Leave may be refused to a plaintiff to discontinue the action, if the plaintiff is not wholly *dominis litis* or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him".

If the applicant here is *dominis litis* then leave to discontinue may be granted. If he is not, then it is unlikely that I would grant him leave to discontinue I do not think that the applicant is wholly *dominis litis*. He cannot dispose of the case as he thinks fit or allow it to be dismissed or let judgment go by default. The parties have come to a stage where the respondent/chargor has gained an upper hand by an advantage in that he could find flaws in the applicant/chargee's allegations namely the wrong dates in the memorandum etc. and the fact that the reason for wanting a discontinuance is not a very strong one. The respondent/chargor is not to be deprived of these advantages which have made him a well-matched adversary in the arena.

Having considered all these points I am of the opinion that the application to discontinue should be dismissed.

I shall now go on to the merits of the case and consider the application for an order for sale. The respondent/chargor's first ground of opposition to this application is that the contract is unenforceable because of non-compliance with the Moneylenders Ordinance, 1951. The relevant part of section 16(1) of the Ordinance reads:—

"No contract for the repayment by a borrower ... of money lent to him ... and no security given by the borrower ... in respect of any such contract, shall be enforceable unless a note or memorandum in writing of the contract ... be delivered to the borrower ... before the money is lent".

And section 16(3) reads:—

"The note or memorandum aforesaid shall contain all the terms of the contract and in particular shall show separately and distinctly, (a) the date of the loan, (b) the principal, and (c) the rate of interest *per centum* per annum payable in respect of such loan or, where the interest is not expressed in terms of a rate *per centum* per annum, the amount of such interest."

In his affidavit the respondent/chargor said that the date of the loan in the memorandum was wrong. Clause 2 of the memorandum states: —

"The said principal sum shall be advanced on the 18th day of January 1969 after the memorandum has been signed by the parties hereto and a copy thereof has been delivered to the borrower".

In this case the memorandum of agreement was signed and delivered on 21st January 1969 and not the 18th as stated in the memorandum. The respondent/chargor maintains that on the 18th there was no memorandum and so the statement that the loan took place on the 18th was wrong. On the other hand if it was said that the loan took place on some other date then the date stated in the memorandum was wrong.

Furthermore the memorandum did not really set out the terms of the loan. The memorandum states that payment of the loan was to be made on the 18th but in actual fact the payment was made in various amounts on different dates subsequent to the signing on the 21st. On the 21st $8,000 was paid by cheque, $150 was deducted for solicitor's fees in execution of the charge, stamps and registration, $1,500 was deducted for service charge for the loan. The balance, a sum of $5,350 was paid on the 23rd by cheque. This would also constitute a non-compliance of section 16(3) in that the terms are not fully set out. Therefore the memorandum does not contain all the terms of and the real date of the loan. Is this non-compliance sufficient to render the contract unenforceable? *Meston* on Moneylending 5th Edn. at pp. 94-95 states:

"... failure to observe the requirements contained in [section 16(3) i.e. date, amount, interest etc.] will not necessarily render the contract unenforceable for the moneylender may make some slight error or omission which constitutes a variation from the requirements of the section. If the error or omission is material then the contract will be unenforceable but not otherwise. The materiality of any such variation is it is submitted a question of law for the judge."

If the error or omission is calculated to mislead or tends to mislead them it is material and unenforceable. In *Sherwood* v. *Deeley*[4] two different dates appeared in two different places as a result of an accidental slip. The contract was held not to be vitiated. The present case can be distinguished from the last mentioned case. In this case unlike the other it could not possibly have been an accidental slip for it appears repeatedly in both memoranda. It is therefore in my opinion a material error which tends to mislead. The burden is always on the person seeking to enforce the contract to show that the requirements of the section have been fulfilled. Here the applicant has not discharged this burden. They have not replied to the respondent/chargor's affidavit which alleges that they have not complied with the Ordinance. The contract is by reason of this non-compliance unenforceable.

Respondent/chargor's second contention is that the charge is void as he had no power to charge the land. The power of an executor to deal with property which he obtained under a will is defined by the will, and, being also the trustee, by the Trustee Ordinance, 1949. After examining the will I am satisfied that neither the will nor the Trustee Ordinance confers power upon the respondent/chargor to charge the said land. As such the charge is void. It is regretted that the respondent/chargor having obtained a loan of a very substantial amount now need not pay up. This is indeed a lesson to be learnt by moneylenders in future to be more careful when lending money on a security and also to be sure that the Moneylenders Ordinance has been fully complied with. The Moneylenders Ordinance is calculated to protect borrowers from unscrupulous moneylenders but careless moneylenders are also caught by it.

Thirdly the respondent/chargor contends that the notice under Form 16D of the National Land Code is in the wrong form and as such the notice is defective. This point I need only deal with cursorily because the point has been dealt with fully in an earlier case of *Mary Michael* v. *United Malayan Banking Corporation Bhd.*[5]

Form 16D can be used for any charge, whereas Form 16E is to be used specially where the principal sum is payable on demand. So that even where the principal sum is payable on demand Form 16D can still be used. And I quote relevant passages from the Federal Court in *Mary Michael's* case.

Per Azmi L.P. at page 172:

"It is to be observed that a notice in Form 16D applies to any charge so that it can validly be used even in the case of a charge where the principal sum is payable on demand, even though Form 16E is specially designed for this purpose. This would be particularly true of a charge where the principal sum bears interest and the chargor is in default of payment of interest as stipulated in the charge... whereas Form 16D can be used whether or not the principal sum is payable on demand, Form 16E can be used only if the principal sum is payable on demand."

Per Ali F.J. at page 174:

"When a chargee issues a notice in Form 16D I do not think it can possibly be objected to as was done in this case. A chargee entitled to ask for an order for sale under section 255 of the National Land Code to which Form 16E is applicable is not, I believe, precluded from proceeding under section 254 of the Code if he so chooses."

These passages are self-explanatory and I need elaborate no further. The consequence of this case would be that to be on the safe side Form 16D should always be used.

For the sake of completeness I would like to consider whether this could have been properly a case under Form 16E though even if it is, a notice under Form 16D is not fatal to the case. For this purpose both the memoranda must be examined. Clause 1 of the annexure to the memorandum of charge reads in part:

"... the repayment on demand of the sum of $15,000 (Dollars Fifteen Thousand only) ... referred to as 'the principal sum') together with interest thereon as the rate of twelve *per centum* (12%) per annum ... but ... until such demand is made ... the chargor shall pay the principal sum with interest thereon ... by monthly instalments of dollars three hundred and forty-six and cents fifty only ($346.50)...."

Clause 4 of the memorandum of agreement reads in part:

"... and will agree to pay the said principal sum and the interest ... by monthly instalments of $346.50 (dollars three hundred and forty-six and cents fifty only)....".

It is clear from these two clauses that the repayment on demand is not only of the principal sum but of the interest as well. When the charges demanded payment of $1,386 it was for the principal sum plus interest for four monthly instalments. It is thus proper to use Form 16D.

I therefore order the following: —

(1) That the application for order for sale be dismissed with costs. (2) That the applicant/chargee deliver up the note or memorandum to the respondent/chargor for cancellation. (3) That within 14 days from today *i.e.*, the date of the order the applicant/chargee deliver to the respondent/chargor's solicitors the duplicate copy of the memorandum of the charge and all documents of title to the land. (4) That within 14 days from today the applicant/chargee must execute a registrable memorandum of discharge, thereby discharging the Charge Presentation No. 574 Vol. CXCVI Folio 142 against the whole of the land held under certificate of title No. 25701 for Lot No. 286 in the Town of Kuala Lumpur in the District of Kuala Lumpur and deliver the same to the respondent/chargor or his solicitors and failing that the senior assistant registrar of the High Court Kuala Lumpur be empowered to execute the memorandum of discharge for and on behalf of the applicant/chargee.

Application dismissed.

Solicitors: *Yeo & Yeo; M. Segaram & Co.*

DORESAMY v. PUBLIC SERVICES COMMISSION

[O.C.J. (Raja Azlan Shah J.) June 1, 1971]

[Kuala Lumpur — Originating Motion No. 42 of 1970]

Administrative Law — Mandamus — Dismissal of public servant for breach of code of conduct — Public Officers (Conduct and Discipline) (General Orders, Chapter "D") Regulations, 1969, reg. 3(e).

Administrative Law — Dismissal of public servant — Application for mandamus against Appeal Board to hear applicant's appeal — Procedure — Public Services Disciplinary Board Regulations, 1967, reg. 12(1), 13(1), 14 and 15.

Administrative Law — Dismissal — Statutory right of appeal — Right to counsel — Regulations silent on right to legal representation — Whether aggrieved person can be deprived of fundamental right — Public Services Disciplinary Board Regulations, 1967, reg. 13(1).

Interpretation — Public Officers (Conduct and Discipline) (General Orders, Chapter "D") Regulation, 1968 — Proclamation of Emergency — Regulations suspended — Provisions of Public Officers (Conduct and Discipline) (General Orders, Chapter "D") Regulations, 1969 effected — Procedure adopted by Appeal Board — Guided by Regulations, 1969, reg. 30(8).

The applicant was employed as an office-boy at the Registry of Societies, Kuala Lumpur. On May 5, 1969, he was arrested and kept in custody under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. He was then placed under a Restricted Residence Order. Accordingly, he had thus committed a breach of code of conduct under regulation 3(e) of the Public Officers (Conduct and Discipline) (General Orders, Chapter "D") Regulations, 1969 in that he had conducted himself in such a manner as to bring the Public Services into disrepute or to bring discredit thereto.

The Public Services Disciplinary Board recommended disciplinary proceedings against the applicant with a view to dismissal. The applicant was given an opportunity to be heard and he was represented by his solicitors. The board dismissed the applicant from his service. He appealed to the appeal board through his solicitors. The chairman of the Disciplinary Board noticing that the appeal was made by the applicant's solicitor, wrote a letter to the applicant in the following terms: "I have the honour to inform you that your appeal against your dismissal from the service cannot be considered by the Public Services Commission as the appeal was made through your solicitor and not by you personally in writing as provided by regulation 13(1) of the Public Services Disciplinary Board Regulations, 1967. In view of the above, your dismissal from the service has now become absolute..."

Regulation 13(1) states: "An appeal shall be made in writing by a person aforesaid (hereinafter referred to as 'the appellant') to an appeal board through his head of department..."

The applicant applied for an order of *mandamus* against the Public Services Commission and the Public Services Dis-